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Mohd Fariz bin Mohd Ali v Public Prosecutor

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HIGH COURT (MELAKA) — CRIMINAL APPLICATION NO MA-43(A)-2–10 OF 2023
MOHD RADZI ABDUL HAMID J
14 MARCH 2024

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Criminal Procedure — Revision — Application for — Applicant charged at sessions court with four offences under s 17(a) of Malaysian Anti-Corruption Commission Act 2009 — Application to High Court for revision after trial judge found that prima facie case had been established under all charges and applicant called to enter defence — Whether High Court could exercise its powers of revision on finding of prima facie — Whether there were special circumstances in application — Courts of Judicature Act 1964 s 35 — Criminal Procedure Code s 323

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This was an application for revision brought by the applicant who was charged at the sessions court with four offences under s 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). The application was made after the learned sessions court judge ('the trial judge') found at the end of the prosecution case that the prosecution had established a prima facie case under all the charges against the applicant and consequently called the applicant to enter his defence. The primary ground for the application centred around the alleged failure of the trial judge in judicially and critically examining the prosecution's evidence and in arriving at a conclusion that the elements of the offence under s 17(a) of the MACC Act for each of the charges were sufficiently proven by the prosecution and thereby triggering the presumption under s 50 of the MACC Act on corruptly receiving gratification. It was the applicant's claim that: (a) the evidence did not show the applicant had corruptly received gratification as charged and therefore the trial judge erred in finding that the facts triggered the presumption of corruption under s 50 of the MACC Act; and (b) the trial judge committed material failures in evaluating the prosecution's evidence. The applicant contended that this court had the necessary revisionary powers under s 35 of the Courts of Judicature Act 1964 and s 323 of the Criminal Procedure Code ('the CPC') to review the trial judge's finding of prima facie and to set aside the same and following that, acquit him.

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Held, dismissing the application:

(1) Whilst the finding of prima facie was a matter that came within the purview of s 323 of the CPC and therefore the High Court could, as a

matter of general statement, be moved to review such finding, that power should not be readily exercised. A finding of prima facie should not be subject to a revision. A revision following the finding of prima facie would cause trials to be stalled not only pending the disposal of such application but also by any appeals following a decision of the High Court on the revision. A revision of the finding of prima facie would also be tantamount to re-litigating the issues and facts which had been deliberated by the trial court, a matter which should only be done at the appeal stage. The High Court's power to exercise its revisionary powers on a finding of prima facie should only be exercised sparingly and in truly exceptional circumstances (see paras 22, 24, 28 & 31).

(2) Such exceptional circumstances should be confined only to instances where the accused was charged and the trial proceeded for an offence not known to the law, the charge proffered against the accused was plainly and materially defective, the finding of prima facie was made without any evidence tendered by the prosecution, the finding of prima facie was made solely based on inadmissible evidence and there was non-compliance with procedural requirements of law that rendered the trial invalid and a nullity ab initio. There should be no revision on the finding of prima facie where the grounds for an application merely rested on alleged failures by the trial court in the evaluation and examination of evidence, evaluation of witnesses, finding of facts, the making of inferences based on finding of facts, the proof of elements of the offence based on those findings and the invocation of presumptions. The assumption that the trial court had evaluated all evidence in arriving at the finding of prima facie must remain true until shown otherwise on appeal (see paras 32–34).

(3) The reasons presented by the applicant did not fall into any of the types of exceptional circumstances. The applicant's complaints against the finding of prima facie were purely based on the matter of evaluation of evidence by the trial judge and whether that evaluation correctly triggered the presumption of a corrupt act under s 50 of the MACC Act. Since the issues raised in this application rested on the matter of evaluation and finding of facts, then no challenge could be mounted against the finding of prima facie until the conclusion of the trial and by way of an appeal (see paras 36–37).

[Bahasa Malaysia summary

Ini adalah permohonan semakan yang dibawa oleh pemohon yang didakwa di mahkamah sesyen dengan empat kesalahan di bawah s 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM'). Permohonan ini dibuat selepas hakim mahkamah sesyen ('hakim bicara') mendapati pada akhir kes pendakwaan bahawa pendakwaan telah membuktikan kes prima facie di bawah semua pertuduhan terhadap pemohon dan seterusnya mengarahkan

pemohon untuk membela diri. Alasan utama untuk permohonan ini tertumpu pada dakwaan kegagalan hakim bicara dalam memeriksa dengan teliti dan kritikal keterangan pendakwaan dan membuat kesimpulan bahawa elemen kesalahan di bawah s 17(a) Akta SPRM untuk setiap pertuduhan telah dibuktikan secukupnya oleh pendakwaan dan dengan itu mencetuskan anggapan di bawah s 50 Akta SPRM mengenai rasuah menerima suapan. Pemohon mendakwa bahawa: (a) keterangan tidak menunjukkan pemohon telah secara rasuah menerima suapan seperti yang didakwa dan oleh itu hakim bicara melakukan kesilapan dalam mendapati fakta mencetuskan anggapan rasuah di bawah s 50 Akta SPRM; dan (b) hakim bicara melakukan kegagalan material dalam menilai keterangan pendakwaan. Pemohon berhujah bahawa mahkamah ini mempunyai kuasa semakan yang diperlukan di bawah s 35 Akta Mahkamah Kehakiman 1964 dan s 323 Kanun Tatacara Jenayah ('KTJ') untuk menyemak dapatan prima facie oleh hakim bicara dan untuk mengetepikan dapatan tersebut dan seterusnya, membebaskannya.

Diputuskan, menolak permohonan:

(1) Walaupun dapatan prima facie adalah perkara yang termasuk dalam bidang kuasa s 323 KTJ dan oleh itu Mahkamah Tinggi boleh, sebagai kenyataan umum, bertindak untuk menyemak dapatan tersebut, kuasa itu tidak seharusnya dilaksanakan dengan mudah. Dapatan prima facie tidak sepatutnya tertakluk kepada semakan. Semakan selepas dapatan prima facie akan menyebabkan perbicaraan tertangguh bukan sahaja sehingga selesainya permohonan tersebut tetapi juga oleh sebarang rayuan selepas keputusan Mahkamah Tinggi mengenai semakan itu. Semakan dapatan prima facie juga akan membicarakan semula isu dan fakta yang telah dipertimbangkan oleh mahkamah bicara, perkara yang sepatutnya hanya dilakukan di peringkat rayuan. Kuasa Mahkamah Tinggi untuk melaksanakan kuasa semakannya terhadap dapatan prima facie hendaklah dilaksanakan dengan berhati-hati dan dalam keadaan yang benar-benar luar biasa (lihat perenggan 22, 24, 28 & 31).

(2) Keadaan luar biasa sedemikian hendaklah terhad kepada keadaan di mana tertuduh didakwa dan perbicaraan dijalankan untuk kesalahan yang tidak diketahui undang-undang, tuduhan terhadap tertuduh adalah dengan jelas dan nyata cacat, dapatan prima facie dibuat tanpa sebarang keterangan yang dikemukakan oleh pendakwaan, dapatan prima facie dibuat semata-mata berdasarkan keterangan yang tidak boleh diterima dan terdapat ketidakpatuhan terhadap keperluan prosedur undang-undang yang menyebabkan perbicaraan tidak sah dan batal dari awal. Tidak sepatutnya ada semakan terhadap dapatan prima facie di mana alasan permohonan hanya bergantung pada dakwaan kegagalan mahkamah perbicaraan dalam penilaian dan pemeriksaan keterangan, penilaian saksi, dapatan fakta, membuat inferens berdasarkan dapatan fakta, pembuktian elemen kesalahan berdasarkan dapatan itu dan

penguatkuasaan anggapan. Andaian bahawa mahkamah bicara telah menilai semua keterangan dalam mencapai dapatan prima facie mesti kekal benar sehingga dibuktikan sebaliknya semasa rayuan (lihat perenggan 32–34).

(3) Alasan yang dikemukakan oleh pemohon tidak termasuk dalam mana-mana jenis keadaan luar biasa. Aduan pemohon terhadap dapatan prima facie semata-mata berdasarkan perkara penilaian keterangan oleh hakim bicara dan sama ada penilaian itu dengan tepat mencetuskan andaian tindakan rasuah di bawah s 50 Akta SPRM. Memandangkan isu-isu yang dibangkitkan dalam permohonan ini adalah berkisar pada perkara penilaian dan dapatan fakta, maka tiada cabaran boleh dibuat terhadap dapatan prima facie sehingga kesimpulan perbicaraan dan melalui rayuan (lihat perenggan 36–37).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727, FC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 792, FC (refd)
Jagmal Raja v The Crown [1950] Cri LJ 50, HC
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (folld)
Karpal Singh a/l Ram Singh v PP [2012] 5 MLJ 293; [2012] 5 CLJ 537, FC (refd)
Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 2 MLJ 133, FC (refd)
Liaw Kwai Wah & Anor v PP [1987] 2 MLJ 69, SC (refd)
Lim Hung Wang & Ors v PP [2011] 9 MLJ 752, HC
Low Thiam Hock v PP [2021] 4 MLJ 856, CA (folld)
Murugan a/l P Subramaniam v PP and another case [2022] MLJU 2668; [2022] CLJU 2518, HC (refd)
Ng Siam Cheng Sufiah v PP [2019] SGHC 281; [2020] 4 SLR 659, HC (refd)
Nicholas Hui Chung Weng v PP [2020] MLJU 362; [2020] CLJU 229, HC (refd)
PP v Chan Kok Poh [2021] MLJU 1979, HC (refd)
PP v Kamal Hisham bin Ja'afar [2015] MLJU 1209; [2016] 1 CLJ 303, HC (refd)
PP v Kulasingam [1974] 2 MLJ 26; [1974] 1 MLRH 112 (refd)
Pendakwa Raya lwn Loo Peng Wah [2023] MLJU 33; [2023] CLJU 51, HC (refd)
PP v Muhari bin Mohd Jani & Anor [1996] 3 MLJ 116; [1996] 3 MLRH 717, HC (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)
PP v Sim Wei Der & Ors [2024] 7 MLJ 211; [2023] 9 CLJ 995, HC (refd)
Pendakwa Raya lwn Kishendev Prasad Ravishankar [2021] MLJU 2053, HC (refd)
Pendakwa Raya lwn Lee Zheen Ning dan lain-lain [2023] MLJU 1537, HC (refd)

Pendakwa Raya lwn Mohana Sundharam a/l Arunachalam dan satu lagi [2023] 12 MLJ 274; [2023] 8 CLJ 280, HC (refd)
Saad bin Abas & Anor v PP [1991] 1 MLJ 129, CA (refd)
Sukma Darmawan Sasmitaat Madja v Pendakwa Raya [1999] MLJU 219; [1999] 3 CLJ 361, HC (refd)
Tan Sri Eric Chia Eng Hock v PP (No 1) [2007] 2 MLJ 101; [2007] 1 CLJ 565; [2007] AMR 643, FC (refd)

Legislation referred to

Criminal Procedure Code ss 26, 173(h), (h)(i), 323, 323(1)
Courts of Judicature Act 1964 s 35
Dangerous Drugs Act 1952 s 39B
Malaysian Anti-Corruption Commission Act 2009 ss 17(a), 50

Hamidi bin Mohd Nor (Shahrul Hamidi & Haziq) for the applicant.
Mohd Irwan Shah bin Abdul Samat (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Mohd Radzi Abdul Hamid J:

MATTER BEFORE THIS COURT

[1] This a decision on an application for revision brought by the applicant who was charged at the Melaka Sessions Court with four offences under s 17(a) of the Malaysian Anti-Corruption Commission Act 2009. This application is made after the learned sessions court judge ('trial judge') found at the end of the prosecution case that the prosecution had established a prima facie case under all the charges against the applicant and consequently called the applicant to enter his defence.

[2] The primary ground for this application centers around the alleged failure of the trial judge in judicially and critically examining the prosecution's evidence and in arriving at a conclusion that the elements of the offence under s 17(a) of the MACC Act for each of the charges were sufficiently proven by the prosecution and thereby triggering the presumption under s 50 of the MACC Act on corruptly receiving gratification. It is the applicant's claim that the evidence did not show the applicant had corruptly received gratification as charged and therefore the trial judge erred in finding that the facts triggered the presumption of corruption under s 50 of the MACC Act.

[3] The applicant seeks to move this court to find that the trial judge's finding of prima facie was not supported by evidence, manifestly wrong and illegal. The applicant claims that the trial judge committed material failures in evaluating the prosecution's evidence. These failures are:

(a) the incorrect application of presumption under s 50 of the MACC Act;

(b) failure to consider that there was selective prosecution against the applicant;

(c) failure to appreciate whether or not the applicant had the necessary criminal intention; and

(d) failure to consider inconsistencies in the prosecution evidence.

It is argued that these failures amounted to substantial injustice on the applicant and therefore the applicant should not have been ordered to enter his defence.

[4] Based on those reasons, the applicant contends that this court has the necessary revisionary powers under ss 35 of the Courts of Judicature Act 1964 ('the CJA') and 323 of the Criminal Procedure Code ('the CPC') to review the trial judge's finding of prima facie and to set aside the same and following that acquit him.

ARGUMENTS OF PARTIES

By the applicant

[5] The applicant's main contention in this application is that under s 35 of the CJA this court's power of revision is exercisable at any stage of the criminal proceedings and therefore this court is not precluded from reviewing a decision made on the finding of prima facie. Section 35 provides:

> ... the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, *at any stage in any matter or proceeding*, whether civil or criminal ...

[6] Thus where it is desirable to serve the interest of justice, it is argued that this court should be ready and willing to interfere with any decision on the finding of a prima facie wrongfully or illegally made by the trial court. The words used in s 35 of the CJA when read together with s 323 of the CPC provides the High Court with wide powers of revision not limited only to final judgments or orders such as after conviction and sentence but includes interlocutory finding or orders. Section 323(1) of the CPC reads:

> A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of *any finding, sentence or order* recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

[7] Reference was made to the decision in and *Ng Siam Cheng Sufiah v Public Prosecutor* [2019] SGHC 281; [2020] 4 SLR 659. In that case of the High Court of Singapore held the view that the powers of a court in hearing revision applications are wide and not limited to only final orders:

> [37] With respect, both cases cited by the respondent appeared to have been read outside of their proper contexts. In any event, the applicable case law on s 370, including my earlier decision of *Jeremy Lee* ([32]), supports the view that the High Court's revisionary jurisdiction is wide and not limited to final orders.
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> [38] In *Public Prosecutor v Sollihin bin Anhar* [2015] 2 SLR 1, Jay Yong Kwang J (as he then was) considered that the revisionary powers of the High Court were sufficiently broad to allow it to reverse a decision by the State Courts to grant bail to an accused. In reaching this decision, Jay J noted at [14] that both parties had agreed that a decision arrived at in relation to a bail application was interlocutory in nature and did not amount to a judgment or order of finality from which an avenue for appeal arises. The lack of finality in the State Courts' decision was of no significance.
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> [39] In *Rajendar Prasad Rai and another v Public Prosecutor and another matter* [2017] 4 SLR 333 ('Rajendar'), Sundaresh Menon CJ was faced with the question of whether the Magistrate had appropriately exercised her discretion to extend seizure under s 370 of the CPC. He was similarly unconcerned with the lack of finality in the magistrate's orders — it did not serve as an obstacle for the court's exercise of its revisionary jurisdiction.
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> [40] Finally, the broader scope of the High Court's revisionary jurisdiction may be seen from the plainly different wording of the applicable sections themselves. Section 395(2)(b) uses the phrase 'the judgment, sentence or order' (Emphasis added.), which may be contrasted with the broader wording of s 400(1), which refers to 'any judgment, sentence or order'.
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> [41] I thus found that there was no merit to the respondent's submission that the present case fell outside of the High Court's revisionary jurisdiction.

[8] Thus, where a miscarriage of justice needs to be corrected this court should not necessarily wait for the matter to be finally disposed through the appeal process before this court's revisionary powers can be invoked. Reference was made to the decision in *Public Prosecutor v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116; [1996] 3 MLRH 717 which referred with approval to the decision of Hashim Yeop Sani J in *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26; [1974] 1 MLRH 112 where it was held:

> The powers of the High Court in revision are amply provided under s 325 of the Criminal Procedure Code subject only to sub-ss (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of 'paternal or supervisory jurisdiction' in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

[9] In *Kulasingam* the facts show that after the case had reached defence case

and one witness for the defence called, the trial of the case was adjourned pending the appointment of a new Sessions Court President. The succeeding President then ordered for the trial be heard *de novo.* The prosecution sought for the trial to continue under s 26 of the CPC whilst the accused sought for the *de novo* order to remain. The High Court held that since the trial had already involved numerous witnesses and exhibits the *de novo* order should be set aside. What is to be noted from this decision is that the court held that the power of revision was wide enough to include consideration of orders made after finding of prima facie by the trial judge (referred to as finding of guilt by the court):

> The present case is a case in point having regard to the large number of witnesses already called and given evidence and the large number of exhibits already tendered. *The difficulty in this case is only that a finding of guilt had already been made by the original President and he had also proceeded to record the evidence of the first defence witness; but this difficulty is not insurmountable. Section 325 of the Criminal Procedure Code allows the High Court in its discretion to exercise any of the powers conferred by s 316 of the Criminal Procedure Code.* The order of the original President on the finding of guilt is in my view an 'order' within the meaning of s 316(c).

[10] Reference was also made to the Indian case of *Jagmal Raja v The Crown* [1950] Cri LJ 50, where the question whether the High Court had the power to review the finding of prima facie by the lower court or of any interlocutory order in a criminal proceeding was considered. After considering a number of cases the court expressed the following opinion:

> 5. The next case was *In re Shripad G Chandraverkar* AIR (15) 1928 Bom 184:(29 Cr LJ 917). This relates to a case in which a pleader was prosecuted under Section 216, Penal Code, for harbouring an offender against whom a warrant of arrest had been issued. The prosecution case had been closed and the case adjourned for arguments as to whether a charge should be framed or not when the case was transferred to another court without notice to the accused who went to the High Court in revision, and it was held that the High Court has power at an interlocutory stage to quash the proceedings if a clear case is made out. Ordinarily, the High Court would not interfere at an interlocutory stage and interfere with the proceedings pending before a magistrate, but when it appears that the accused is not guilty on the face of the proceedings, the High Court will interfere even at an interlocutory stage in order to prevent further harassment of the accused. The proceedings were quashed as it was found that the prosecution evidence did not disclose any offence at all against the petitioner.
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> 6. In *Sheosaran v Jitendra Naih* AIR (16) 1928 Oadhi 292; 39 Cr LJ 657, proceedings were quashed against an accused in a case of cheating by a Division Benoh under Section 561 A, as it was found that the allegations of the prosecution did not establish any' offence against the accused, in spite of the fact that a single Judge bad refused to interfere at an earlier stage in the proceedings.
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> 7. In *Baghunath Puri v Emperor* AIR (19) 1932 Fat 72, Mohammad Noor J relying on *Jagat Chandra v Queen Empress* 26 oal 786: 3 c w N 191, held that ordinarily if the Magistrate has ordered an accused to be tried, the trial must proceed, but when the High Court is satisfied that an accused is being prosecuted without there being

any material before the Magistrate for his prosecution, it will be abdicating its function if it does not interfere to stop patent injustice calling for prompt redress. A

8. In *Wasinda Bam v Bahadur Khan* AIR (21) 1931 Lah 434 : 36 Cr LJ 20, Tek Chand J, held that where a charge is framed but the allegations of the prosecution disclose no offence, the High Court would in revision quash the charge and set aside the proceedings as an abuse of the process of the criminal Court. B

9. The matter is dealt with comprehensively by Sir Syed Wazir Hasan O, J in *Abdul Wali v Emperor 9 Luck* 61: AIR (20) 1933 oudh 387:36 Cr LJ 148), where he made the following observations:

> *Ordinarily the High Court will not interfere at an interlocutory stage of criminal proceedings in a subordinate Court but the High Court is under an imperative obligation to interfere in order to prevent the harassment of a subject of the Crown by an illegal prosecution. It would also interfere whenever there is any exceptional and extraordinary reason for doing so.* One of the tests to apply in order to determine whether any particular ease is of that exceptional nature or not Is to see whether a bare statement of the facts of the case should be sufficient to convince the High Court that it is a fit case for its interference at an intermediate stage. Another test to be applied Is to see whether in the admitted circumstances of the case it would be a mock trial if the case is allowed to proceed. Broadly speaking the High Court will generally interfere in the interests of justice and to stop abuse of process of law. C D E
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> Where, therefore, the facts float on the surface and it seems that no assistance from a *deus ex machina* is required to see that there is not even a scintilla of suspicion of criminal liability as against the accused the High Court would interfere and quash the charge because to allow the proceedings to continue would be allowing a farce to be enacted to the great harassment of the accused. F
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> 10. *From the above decisions, it was clear that it is unusual for the High Court to interfere in revision in cases pending in subordinate Courts, and that interference to quash proceedings should only take place in two contingencies, (1) if the prosecution allegations, even when accepted as true, do not establish any offence against the accused, and (2) where an offence is established if the allegations are believed, but there is no evidence at all to support the allegations.* G

[11] Learned counsel for the applicant further sought for this court to take cognisance of and consider following the position taken by the High Court at Kuala Lumpur in the case of Bung Mokhtar Radin and Zizie Izette Abdul Samad where the court had exercised its revisionary powers to reverse the trial court's finding prima facie on the grounds that there was insufficient evidence to support that finding. It must be noted that as at the date of hearing of this application the grounds of decision of the High Court in that case is not available for this court's consideration although an appeal has been filed by the prosecution. H I

By the respondent

[12] The respondent argues on the other hand that this application should be dismissed on the grounds that:

(a) the finding of prima facie is not a finding of guilt against the applicant;

(b) the revision against a prima facie ruling will involve the review of evidence of the prosecution which will tantamount to re-litigating and rearguing the prosecution case when the law obligates the accused to enter his defence and proceed with the trial once an order to that effect is made;

(c) allowing a revision on a finding of prima facie will result in the opening of flood gates of revision applications that will stall trials; and

(d) a revision at that stage can lead to abuse of process of court where the accused will have a second bite at the proverbial cherry in the event he loses the revision and then comes back again to set aside his conviction in the event of an appeal after the end of the trial.

[13] References were made to the decisions in *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; *Low Thiam Hock v Public Prosecutor* [2021] 4 MLJ 856; *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727, and *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133.

[14] In particular, reliance was made on the decision in *Lim Hung Wang & Ors v Public Prosecutor* [2011] 9 MLJ 752. That case is similar to the present application in that the accused had also sought by way of revision to challenge the trial court's finding of prima facie on the grounds that there was failure to judicially examine all the prosecution's evidence. In that case the accused was charged for the offence of drug trafficking under s 39B of the Dangerous Drugs Act 1952. Although the application was denied on the ground that a High Court cannot review its own finding of prima facie the court's discussion on the demerits of reviewing the finding of prima facie is relevant. His Lordship Zawawi Salleh J (as he then was) held:

> [17] In dealing with the matter of revision on its earlier finding made by this court, there is nothing in s 180 of the CPC explicitly provides such power.
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> [19] The decision by Lamin Mohd Yunus PCA in *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 (CA), is very clear on this point and it is still a good law and has been applied by the Federal Court in *Letchumanan a/l Suppiah v Public Prosecutor and another appeal* [2009] 5 MLJ 597 (FC). His Lordship had this to say at p 133:
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> > A complete criminal trial involves both the case for the prosecution and the case for the defence. This is implied from the very charge itself. A charge accuses a person of having committed an offence. That suggests that he has to put up his

defence. *The moment the prosecution has proved its case meaning that the court has decided that there is a case for the accused to answer the accused must therefore forthwith enter his defence. So it would be premature to Question whether the decision calling for the accused to enter his defence was right and wrong. The proceedings must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the accused.* On the other hand, if he is acquitted at the end of the case for the prosecution, that means that the court has decided the fate of the accused and that as far as that court is concerned, the accused is a free man. Similarly, when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his defence, it is as good as saying that the sessions court judge himself has decided to call for the defence assuming that he has analysed the case in the way that the High Court judge has done. Only after he has heard the defence can he finally decide the fate of the accused. (Emphasis added.)

[20] In the same vein, Abdul Malik bin Ishak JCA in the Court of Appeal's case *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 2 CLJ 845 said:

In a criminal trial, the procedure is rather simple. At the end of the prosecution's case, if the trial court finds that there is a prima facie case against the accused, the trial court *has to call upon the accused to enter his defence.* The accused is under obligation to make his defence. (Emphasis added.)

[15] Thus, the crux of the respondent's opposition to this application is that in any criminal trial, once the trial court makes a finding of prima facie, the court is duty bound under s 173(h)(i) of the CPC to order the applicant to enter his defence and the trial should proceed. The applicant will have his opportunity to present any evidence towards raising any reasonable doubt in the prosecution's case. The finding of prima facie is not open to revision since that finding is not conclusive on the guilt of the applicant. In the event the trial court decides against the applicant at the end of the trial, the applicant can then raise all the issues raised in this application at the appeal.

ISSUES

[16] After hearing arguments from both parties this court forms the view that the outcome of this application is dependent upon the determination of the following questions:

(a) can the High Court exercise its powers of revision on a finding of prima facie;

(b) if the answer to that question is yes, what would be the circumstances permitting a revision; and

(c) whether such circumstances are present in this application.

A DELIBERATIONS BY THIS COURT

Can the High Court exercise its powers of revision on a finding of prima facie

B **[17]** It would be unnecessary for this court to reproduce the numerous decisions that have dealt with the law on the powers and duties of a High Court in hearing revisions. However for the sake of brevity it would suffice to refer to the decision of the Federal Court in *Tan Sri Eric Chia Eng Hock v Public Prosecutor (No 1)* [2007] 2 MLJ 101; [2007] 1 CLJ 565; [2007] AMR 643, where the following was expressed:

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> [32] It has been said that a 'revision is not a right and is only a procedural facility afforded to a party, while an appeal is a statutory right conferred on a party. It cannot be said that a proceeding in revision is a continuation of the suit, appeal or trial, ft is only a step-in-aid for invoking the powers of superintendence by the sessions judge and the High Court for correcting irregularities if any, in the judgments and orders of the subordinate courts. Interference in revision being a discretionary power vested in the superior courts, a revision petition cannot be considered to be a continuation of the proceedings pending in the trial court or the appellate court' (see: *Kunhammad v Abdul Kader* [1977] KLT 840). Similarly, in *Ku Izham bin Ku Adnan v Public Prosecutor* [1998] 5 MLJ 720; [1998] 2 CLJ 956) it was said that the 'object of a revision is to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted in some injury to the due maintenance of law and order or in some undeserved hardship to individuals. The judge's duty is to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court.

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[18] As decided by the Supreme Court in *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69, the revisionary powers although discretionary must be exercised judicially within the limits and spirt of the legislation. The power of revision is to be used sparingly, with regard to all the circumstances of each particular case, for the purpose of preventing or correcting a miscarriage of justice. Wide as the power may be, it has to be exercised judicially (see *Sukma Darmawan Sasmitaat Madja v Pendakwa Raya* [1999] MLJU 219; [1999] 3 CLJ 361).

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[19] The High Court's power of revision under s 323 of the CPC covers:

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(a) any finding, sentence or order recorded or passed; and

(b) the regularity of any proceedings of the subordinate court. In accordance with s 35 of the CJA, the power is exercisable at any stage of the criminal proceeding. The power is not limited only to final orders but also interlocutory orders at any stage in a criminal proceeding as can be seen

from numerous decisions where the powers of revision of the High Court has been sought in interlocutory matters that include remand (*Pendakwa Raya lwn Mohana Sundharam a/l Arunachalam dan satu lagi* [2023] 12 MLJ 274; [2023] 8 CLJ 280; *Pendakwa Raya lwn Kishendev Prasad Ravishankar* [2021] MLJU 2053; *Pendakwa Raya lwn Lee Zheen Ning dan lain-lain* [2023] MLJU 1537), an application to recall witnesses (*Public Prosecutor v Sim Wei Der & Ors* [2024] 7 MLJ 211; [2023] 9 CLJ 995; *Public Prosecutor v Chan Kok Poh* [2021] MLJU 1979), surrender of passport to an accused facing trial (*Pendakwa Raya lwn Loo Peng Wah* [2023] MLJU 33; [2023] CLJU 51; *Nicholas Hui Chung Weng v Public Prosecutor* [2020] MLJU 362; [2020] CLJU 229) and bail (*Murugan a/l P Subramaniam v Public Prosecutor and another case* [2022] MLJU 2668; [2022] CLJU 2518; and *Public Prosecutor v Kamal Hisham bin Ja'afar* [2015] MLJU 1209; [2016] 1 CLJ 303). Thus, the revisionary powers of the High Court is not confined only to findings or orders on conviction and sentence.

[20] In *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293; [2012] 5 CLJ 537 the Federal Court was posed with the issue whether a finding of prima facie is a decision against which an appeal can lie. In holding that a decision on the finding of prima facie is a decision that is not appealable, the Federal Court held that such a finding is a decision or order that is interlocutory in nature:

> [20] A scrutiny of the scope of the term 'decision' in s 3 of the CJA reveals that its definition does not extend to the types of 'judgments or orders' which can be termed as 'interlocutory'. In other words, if a judgment or order is not final, in the sense that it does not finally dispose of the rights of the parties in the trial, then it would not fall within the definition of the word 'decision' under s 3 of the CJA, and thus not appealable.

[21] Thus, a ruling on prima facie which is a finding made by a trial court at an interlocutory stage in a criminal proceeding comes within the scope of s 323 of the CPC.

[22] However, whilst this court finds that the finding of prima facie is a matter that comes within the purview of s 323 of the CPC and therefore the High Court can, as a matter of general statement, be moved to review such finding, that power should not be readily exercised. The reasons for this are discussed below.

[23] To begin with, this court refers to the observations made by the Federal Court in *Karpal Singh*. In that case, the Court of Appeal having heard the prosecution's appeal reversed the High Court's decision to acquit the accused at the end of the prosecution case and held that there was sufficient evidence for

a finding of a prima facie case and ordered the accused to enter his defence. One of the issues for determination was whether the Court of Appeal's decision on the finding of prima facie was appealable. The Federal Court held that since the order did not finally dispose of the rights of parties and interlocutory in nature, the order was not appealable and the accused must enter his defence and proceed with the trial. The part of that decision which this court finds relevant to the present application is where Suriyadi FCJ speaking for the Federal Court expressed the view that an appeal against such a ruling will result in the delays of trials and is therefore not desirable and not consistent with the requirements of the law:

> [16] Section 3 of the CJA defines 'decision' to mean judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. It is not disputed here that the appeal relates to a criminal matter, as witnessed by the procedure adhered to, and in the event of a conviction, may be sentenced to imprisonment or fined (*Seaman v Burley* [1896] 2 QB 344; *Armand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147 Hamid's on *Criminal Procedure*).
>
> [17] *The rationale for non-final decisions being non-appealable is primarily geared towards the speedy disposal of cases; such a policy prejudices nobody in light of the many complaints of ageing cases before. The explanatory notes, clarifying the amendment of s 3 of the CJA introduced by the Amendment Act A1031 of 1998 reads*:
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> > Pada masa ini, semasa mendengar kes, jika mahkamah membuat keputusan tentang kebolehterimaan apa-apa keterangan atau dokumen, pihak yang tidak berpuas hati boleh memfailkan rayuan. Jika rayuan sedemikian difailkan, mahkamah terpaksa memberhentikan pendengaran kes itu sementara menanti keputusan rayuan itu oleh mahkamah atasan. Ini menyebabkan pendengaran itu lambat selesai, lebih-lebih lagi apabila rayuan difailkan terhadap tiap-tiap keputusan yang dibuat oleh mahkamah bicara. Pindaan ini dicadangkan untuk membantu mempercepat pendengaran kes di mahkamah bicara.
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> [18] *From the above explanation it is obvious that Parliament is not oblivious to mid-stream appeals that tend to stall proceedings and delay speedy completion of cases. With justice not being served by unnecessary delays, what with the amended meaning of 'decision' being crystal dear such technical appeals that have the effect of stalling hearings, are now things of the past* (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585 *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2011] 2 CLJ 845). No appeal is permitted if viewed as incompetent and precluded by law, and with the facts as they were before us, we agree with the learned DPP that there was no finality in the decision of the Court of Appeal.
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> [19] In order for a decision to be final, the defence must first be heard, and after a maximum evaluation of the total evidence a decision eventually be made. It is at that conclusive stage, when the fate of the appellant is known, the right of appeal is triggered (*Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 *Maleb bin Su v Public Prosecutor; Cheak Yoke Thong* [1984] 1 MLJ 311; [1984] 2 CLJ Rep 232) ...

> [20] A scrutiny of the scope of the term 'decision' in s 3 of the CJA reveals that its definition does not extend to the types of 'judgments or orders' which can be termed as 'interlocutory'. In other words, if a judgment or order is not final, in the sense that it does not finally dispose of the rights of the parties in the trial, then it would not fall within the definition of the word 'decision' under s 3 of the CJA, and thus not appealable ...

[24] Having considered the views expressed by the Federal Court, this court is inclined to hold for the same reasons that a finding of prima facie should not be subject to a revision. A revision following the finding of prima facie will cause trials to be stalled not only pending the disposal of such application but also by any appeals following a decision of the High Court on the revision. As opined also by the court in *Lim Hung Wang*:

> [37] Since the power of this court to hear criminal cases is regulated by Chapter XX, by allowing inherent power to exceed such power would not only cause chaos to our administration of criminal system but also would open the door to a number of applications in the course of criminal trials which could frustrate criminal proceedings and bring proceedings at all levels of our criminal courts to halt. This consequence is clearly undesirable. The proper time to take the points as contained in the affidavit in support of the application is upon appeal after the court had determined the guilt or innocence of the accused at the end of the entire case.

[25] To add, it is very clear there is nothing in s 173(h) of the CPC that obligates the trial court to pause after the finding of prima facie is made to call an accused to enter his defence only after an appeal or revision on such finding has been finally disposed. As expressed by the court in *Lim Hung Wang* had the Legislature intended to vest the power to review in the High Court upon calling the accused to enter defence the same would have been expressly provided:

> [35] The word 'review' in the context of the High Court jurisdiction has been expressly enacted in Chapter XXXI of the CPC in respect only the finding, sentence or order recorded or passed by the subordinate court and as to the regularity of any proceeding of the same court (see s 323 of the CPC). Hence, should the Legislature intended to vest the power to review in the High Court upon calling the accused to enter defence, the same should have been expressly enacted in s 180(3) of the CPC in particular or Chapter XX of the CPC in general.
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> [36] An illustration of the above proposition that review jurisdiction musi be expressly provided by statute is to be found in our rules of court. The word 'review' in the context of judicial review' has been expressly enacted in O 53 of the Rules of the High Court 1980, in which case, the jurisdiction by way of judicial review is clear and unambiguous. The absence of the word 'review' in art 121(1B), s 67(1) and O 92 r 4 means that no review jurisdiction has ever been conferred upon this court when it was created in 1994.

A [37] Since the power of this court to hear criminal cases is regulated by Chapter XX, by allowing inherent power to exceed such power would not only cause chaos to our administration of criminal system ...

B **[26]** Thus the scheme of procedure in a criminal trial as described by the Court of Appeal in *Saad bin Abas & Anor v Public Prosecutor* [1991] 1 MLJ 129 demands that the defence case be proceeded with when the accused is called to enter his defence:

C If at the end of the prosecution case the court finds that there is a prima facie case against the accused, the court has no other option but to call upon the accused to enter on his defence because of the word 'shall'. When a judge is required by a written law to call upon the accused to enter on his defence upon the prosecution having proved its case, the accused in our view, will then be under an obligation to submit to the order of the judge by making his defence in any way in accordance with the provisions of the law. This supports our earlier proposition that a criminal D trial involves both the prosecution case and the defence as being one single process. There is no room for the accused to avoid the issue of presenting his case. He must comply.

E **[27]** This court would also state further that it should be assumed that by calling an accused to enter his defence the trial court must have been satisfied upon the evaluation of all evidence that the prosecution has established a prima facie case. In *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 the Supreme Court held:

F By calling an accused to enter his defence, *it should be assumed* that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis.

G **[28]** This court agrees with the respondent that a revision of the finding of prima facie will tantamount to re-litigating the issues and facts which has been deliberated by the trial court, a matter which should only be done at the appeal stage. To allow that will open the flood gates of revisions applications that will H also serve as a back door to an appeal. The accused will thus have two rounds at challenging the finding of prima facie, one in a revision and another on appeal after conviction and sentence. Such a process is not expressly provided by the law and therefore cannot be allowed. In this respect the observations of the Court of Appeal in *Low Thiam Hock v Public Prosecutor* [2021] 4 MLJ I 856 should equally apply to an application made after finding of prima facie:

[68] ... By filing this application, the accused will have another chance to question the conviction and sentence if he fails in the application because he can then pursue the issue of his conviction and sentence at the appeal proper. Therefore, it is only appropriate and proper for this court to be vigilant in reviewing the nature of the

application. Although the appellant could file the application, such application must be scrutinised accordingly, so that any one party will not use such application indirectly to gain unfair advantage and thereby undermining the administration of justice meant for all.

[69] In fact, in this regard, a relevant case not cited by the Respondent at the High Court and in this Court, although relevant is the Court of Appeal case of *Muzammil Izat Hashim v Public Prosecutor* [2003] 6 MLJ 590; [2009] 2 CLJ 354. This is a case where Hasan Lah JCA (later FCJ) in delivering judgment, approvingly referred to the case *Dorai Manickam v R* [1936] 1 MLJ 209 that decided a revision is not to be exercised when there is a right to appeal. In *Muzammil* it is said as follows:

> Suffice to say that it has been accepted as settled law that except for very good reasons the High Court should not exercise its revisionary powers when a decision complained of is appealable ...

[70] Therefore, such application should not be used and filed willy-nilly. The Supreme Court in the case of *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35 in this regard said as follows:

> The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice.

[71] Such revision is normally requested only to determine the correctness of conviction and sentence. The revision is not usually meant to be applied when there is an appeal against conviction and sentence as in this case. Normally such revision is only applied to avoid grave injustice from happening considering the exigency of time. In this regard the Federal Court in *Tan Sri Eric Chia* said as follows:

> *It has been said that a revision is not a right and is only a procedural facility afforded to a party, while an appeal is a statutory right conferred on a party.* It is only a step-in-aid for invoking the powers of superintendence by the Sessions Judge and the High Court for correcting irregularities if any, in the judgments and orders of the subordinate courts.

[29] It is also an accepted principle in criminal trials that at the end of the whole trial the court cannot revisit its finding of facts made at the prosecution stage. Doing so will amount to a misdirection warranting the setting aside of a conviction and sentence. Similarly, an application for revision made after finding of will invariably involve a revisiting and reviewing of facts already evaluated at the end of the prosecution case and this should not be permitted. In *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 792 the Federal Court held:

> [38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.

[30] On a further point, since the finding of prima facie and the call or order for an accused to enter his defence is not a pronouncement of his guilt, there is no basis for the trial be stalled to make way for a revision. As held in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 referred to with approval by the Federal Court in *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727 the finding of prima facie is not conclusive of the guilt of an accused. Therefore, an accused will have his day in court by putting up his defence through witnesses and evidence and in the event he is found guilty, in his petition of appeal. As expressed by the Federal Court in *Karpal Singh*:

> [21] A dissatisfied party is never deprived either of his right to appeal after the conclusion of a trial, in the event he feels aggrieved with the ruling made in the course of the trial, as that supposed error could be raised in the appeal proper. Again Arifin Zakaria CJ in *Dato' Seri Anwar Ibrahim v Public Prosecutor* opined:
>
> > The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.
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> ...
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> [23] From the above analysis, in practical terms, the appellant is not disadvantaged by the alleged unequal treatment produced by the word 'decision'. Under s 3 of the CJA the appellant is not prevented from filing an appeal at the end of the trial, and to include in the petition of appeal of any dissatisfaction with any ruling, made in the course of the trial. Such preclusions of appeals mid-stream would lead to the inevitable speedy disposal of cases resulting in an increase in the efficiency of court's administration, and without the appellant's right of appeal being compromised in any way.

[31] Thus, based on the aforesaid reasons, this court holds the view that as a general rule the finding of *prima facie* should not be subject to revision. Nonetheless, as stated earlier s 35 of the CJA and 323 of the CPC are wide enough to arm the High Court with the power to exercise its revisionary powers on a finding of prima facie, it being an order made by the trial Court. That power should only, however, be exercised sparingly and in truly exceptional circumstances.

Exceptional circumstances

[32] In this court's view such exceptional circumstances should be confined only to instances where the accused was charged and the trial proceeded for an offence not known to the law, the charge proffered against the accused is plainly and materially defective, the finding of prima facie was made without any evidence tendered by the prosecution, the finding of prima facie was made solely based on inadmissible evidence and there was non-compliance with procedural requirements of law that rendered the trial invalid and a nullity *ab*

initio. The illegality or impropriety of the proceedings must be so perverse or blatant that renders the entire trial and the finding of prima facie illegal. In such cases there would be clear injustice caused to the accused which must be corrected.

[33] There should be no revision on the finding of prima facie where the grounds for an application merely rest on alleged failures by the trial court in the evaluation and examination of evidence, evaluation of witnesses, finding of facts, the making of inferences based on finding of facts, the proof of elements of the offence based on those findings and the invocation of prima facie presumptions. To allow revisions to be made based on such grounds will open the flood gates of revisions made as a back door to appeal and will bring trials to a halt and cause a malfunction in the administration of justice in the courts. It must be stressed that the idea of justice is not only for an accused but also justice to administration of trials and their disposal.

[34] The view expressed by the court in *Jagmal Raja* that the High Court may be justified in interfering with the finding of prima facie where it were apparent on the face of the record that there is nothing at all from which an inference could be drawn regarding the guilt of the accused must be qualified. In this court's view the assumption that the trial court had evaluated all evidence in arriving at the finding of prima facie as held by *Junaidi bin Abdullah* must remain true until shown otherwise on appeal. For the High Court to exercise such revisionary powers the evidence must be so seriously and materially absent that no prosecution of the charge should have been initiated in the first place and no court of law would have arrived at a finding of prima facie on such evidence.

[35] To summarise, the statement of law on the matter should be: (a) as a general rule there can be no revision on a finding of *prima facie;* (c) the accused must proceed with the trial when called or ordered to enter his defence; and (c) the revisionary powers of the High Court on the finding of prima facie should only be exercised in truly exceptional circumstances.

Whether there are special circumstances in this application

[36] Returning now to the reasons presented by the applicant, this court does not find them falling into any of the types of exceptional circumstances described above. Having considered all the issues raised in the application, this court finds that the applicant's complaints against the finding of prima facie are purely based on the matter of evaluation of evidence by the trial judge and whether that evaluation correctly triggered the presumption of a corrupt act under s 50 of the MACC Act.

[37] Undeniably the duty of a court at the end of the prosecution case is to consider all evidence and to consider them judicially and as decided by the Supreme Court in *Junaidi bin Abdullah* it must be assumed that the trial judge had undertaken and discharged that duty in arriving at a finding of prima facie. Since the issues raised in this application rest on the matter of evaluation and finding of facts, then no challenge can be mounted against the finding of prima facie until conclusion of the trial and by way of an appeal.

[38] This court have perused the minutes of proceedings of the trial court on 30 September 2020 when the decision on the finding of prima facie was made. This court is satisfied that the trial judge had clearly stated that in arriving at her decision she had considered and evaluated all evidence, submissions of parties and authorities relied by them.

[39] This court does not agree that there is a question of legality that affects the validity of the proceedings or the trial. The applicant's contention that the trial judge's invocation of the presumption under s 50 of the MACC Act is illegal because there is no evidence to trigger the application of the presumption inevitably goes back to the evaluation and finding of facts by the trial judge.

[40] On the issue whether there was selective prosecution against the applicant where the applicant alleges that other persons involved in the alleged crime were not charged with him, in this court's view, such complaint should have been raised at the outset of the trial either by way of motion or judicial review to challenge the charges on basis of malicious prosecution. To raise that point after conclusion of the prosecution case is too late in the day and cannot be brought up in this application.

CONCLUSION

[41] To conclude, this court does not find any merit in this application that warrants the intervention of this court. This court respectfully declines to follow the position taken by the High Court at Kuala Lumpur in the unreported decision in the case of Bung Mokhtar Radin and Zizie Izette Abdul Samad, firstly for the reason that at the date of this decision the full grounds of decision in that case is not available for this court's consideration and secondly, being a court of equal jurisdiction this court is not bound to follow that decision.

DECISION

[42] The application is dismissed. This case is therefore remitted back to the sessions court for the applicant to enter his defence as ordered.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh